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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VALERIE O'GRADY,

Plaintiff and Appellant,

v.

DELTA AIRLINES, INC.,

Defendant and Respondent.

B234496

(Los Angeles County

Super. Ct. No. BC419830)

APPEAL from an order of the Superior Court of Los Angeles, Abraham Khan, Judge. Affirmed.

Rehwald Glasner & Chaleff and William Rehwald for Plaintiff and Appellant.

Seyfarth Shaw, Timothy Hix and Hayley E. Macon for Defendant and Respondent.

Appellant Valerie O’Grady contends the trial court abused its discretion in refusing to consider her late-filed opposition to respondent Delta Airlines’ motion for summary judgment. The court deemed the motion unopposed and granted summary judgment after reviewing the moving papers and determining that the facts presented met respondent’s burden as moving party to negate appellant’s claims. As the motion had been filed three months earlier and the court had previously continued the hearing to afford appellant additional time to respond, its decision to disregard an untimely opposition the second time the motion came on for hearing did not represent an abuse of discretion.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2009, appellant Valerie O’Grady filed a complaint for wrongful termination against respondent -- her former employer -- and two individual co-employees.¹ She asserted claims for wrongful termination and disability discrimination under the Fair Employment and Housing Act (Govt. Code, § 12940 et seq.). At the time of filing the complaint and during preliminary proceedings, appellant was represented by counsel. In January 2010, appellant filed a substitution of attorney relieving her prior counsel and began to represent herself in pro per.²

On December 17, 2010, respondent filed a motion for summary judgment. The hearing was scheduled for March 4, 2011.³ Appellant’s opposition was due February 18. On January 14, 2011, appellant informed respondent’s counsel she

¹ The two individuals, Kimberly Barrasso and Jody Griffiths, were described in the complaint as appellant’s supervisors. They are not parties to this appeal.

² Appellant is represented by counsel on appeal.

³ Trial had been set for April 5, 2011. The final status conference had been set for March 30, 2011.

would be out of the country for one month. She neither filed an opposition nor sought an extension of time within which to do so.

On February 28, ten days after her opposition was due, appellant filed an ex parte application for an order allowing her additional time to file and serve her opposition. Appellant stated in a declaration that on January 15, she had traveled to South America and that one of the purposes of the trip was to look for work as a flight attendant. Six days after her departure, she injured her knee, and since the injury occurred, had been in a wheelchair or on crutches and taking pain medication. Respondent opposed the request, contending it was appellant's decision to take the month-long trip to South America, not her injuries, that prevented her from preparing and timely filing the opposition. Although the court found that appellant had been given "ample notice" and "elected to take a trip to South America notwithstanding," in the interest of determining the issues on their merits, the court granted the motion. By order dated February 28, the court continued the hearing to March 30, allowed appellant until March 18 to file her opposition, and gave respondent until March 25 to file a reply. The court's order made clear it would not continue the trial date.⁴

No opposition was filed by the March 18 due date.⁵ On March 23, appellant filed a declaration stating that on March 18 and for several days prior, she was in a Van Nuys courthouse for a hearing on a family law custody issue. On March 18, she sent a messenger to file the summary judgment opposition and was told it had

⁴ The court continued the date of the final status conference to March 30, but did not continue the April 5 trial date. The court subsequently denied respondent's request to continue the trial 30 days, and appellant's competing request to continue the trial 180 days, but agreed to continue the final status conference to April 5 so that the parties would not be required to prepare and file pretrial submissions until after the summary judgment motion was heard.

⁵ In the interim, appellant missed the deadline for exchanging expert witness information.

been “delivered.” On March 22, she received the opposition back from the clerk’s office, along with a letter stating it had been declined for the following reasons: “Your document is incomplete. You have many separate sections and we do not know what you are trying to file. If this is one document, it must be stapled and two hole punched.” Appellant thereafter corrected the deficiencies and filed the opposition March 22.⁶

When the parties arrived for the hearing on March 30, the court’s tentative order stated that the court had reviewed the moving papers, that they were sufficient to shift the burden of proof to appellant, and that appellant had failed to meet that burden as she had “filed no opposition in order to raise any triable issues of material fact.”⁷ At the hearing, the court learned for the first time that appellant had filed the opposition late and that respondent had received it. The court asked counsel for respondent to address whether the matter should be put over a second time to permit the court to review the opposition. Noting that the trial was scheduled to start the following Tuesday, respondent’s counsel stated that putting the matter over would prejudice his client, as trial preparation time had already been expended in anticipation of the April 5 trial date. The court granted summary

⁶ The proof of service incorrectly stated that on March 18 the opposition had been personally served by messenger on respondent’s counsel at their offices in Century City. An attorney representing respondent subsequently explained that on that date her office sent a messenger to pick up the opposition from appellant in Van Nuys. On March 25, respondent filed a reply.

⁷ Even where no opposition is filed, a court cannot grant summary judgment unless the moving party has met its initial burden of proof. (Code Civ. Proc., § 437c, subd. (c); *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1086-1087; *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 111-114.) A defendant moving for summary judgment must show that one or more elements of each cause of action cannot be established or that each cause of action is subject to an affirmative defense. (Code Civ. Proc., § 437c, subd. (o); *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73, fn. 4.) As noted, the court found respondent’s moving papers made the requisite showing.

judgment in accordance with the tentative decision, noting that a second continuance of the hearing would require extension of the trial date.⁸ The court stated that appellant had “stretch[ed] the limits of this court’s generosity with regard to giving you time to make up for what appeared to have been arguable deficiencies on your part as to which there didn’t appear to be due cause or good justification” and had been “a bit cavalier in terms of stretching the limits of this court’s generosity.” The court further stated: “You’ve given this court a potpourri of excuses as to why you couldn’t do A, B, C, and to this date you continue to offer this court excuses as to why you could not do what you were required to do. [¶] And I believe the court has been more than generous with you in terms of giving you a chance to be heard and you have continued to push the envelope.”

Appellant subsequently moved for reconsideration and for relief under Code of Civil Procedure section 473. The court denied the motions. Judgment was entered. This appeal followed.

DISCUSSION

Code of Civil Procedure section 437c requires a party seeking summary judgment to file the motion and supporting papers 75 days before the time appointed for the hearing. (Code Civ. Proc., § 437c, subd. (a).) Oppositions are due 14 days prior to the hearing, giving the party opposing 61 days to prepare and file the opposition. (*Id.*, subd. (b)(2).) “The requirement that opposing papers be filed a reasonable time in advance of the hearing helps to ensure that the court and the parties will be familiar with the facts and the issues so that meaningful argument can take place and an informed decision rendered at the earliest convenient time.” (*Shadle v. City of Corona* (1979) 96 Cal.App.3d 173, 178-179.) “A hearing on a motion for summary judgment cannot be satisfactorily conducted

⁸ The final order stated that the opposition would not be considered as it was “untimely filed” and “there was no proper service.”

if neither the court nor the moving party is familiar with the opposing papers.” (*Id.* at p. 178.)

A trial court’s decision to disregard a late-filed opposition to a summary judgment motion is reviewed for abuse of discretion. (*Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, overruled on another ground in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019.) A party’s neglect resulting in the untimely filing of opposition papers must be evaluated by the trial court “in light of the reasonableness of [his or her] conduct.” (*Kapitanski v. Von’s Grocery Co.* (1983) 146 Cal.App.3d 29, 33.) Due to the “drastic nature” of the summary judgment remedy, courts are generally “required to exercise their discretion and relieve the [party] from tardy opposition filings when his [or her] conduct was reasonable” (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 29-30.)

Numerous courts have held that trial courts must exercise their discretion to excuse the neglect of a party who fails in his or her initial attempt to properly oppose a summary judgment motion and afford him or her an opportunity to cure the deficiencies. (See, e.g., *Security Pacific Nat. Bank v. Bradley* (1992) 4 Cal.App.4th 89, 95 (*Security Pacific*) [trial court abused its discretion by failing to give opposing party opportunity to cure defective opposition containing no counterstatement of facts “where there was no showing [the party’s] failure to file a responsive statement was willful or could not have been promptly corrected if given the opportunity”]; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1161 (*Kalivas*) [trial court abused its discretion in granting summary judgment where opposing party failed to file a separate statement of facts or opposition due to mistaken belief that matter was off calendar and would not go forward until parties complied with local rule requiring that they meet and confer and prepare joint statement].) As the court in *Security Pacific* explained: “[G]ranting a motion for summary judgment based on a procedural error by the

opposing party is equivalent to a sanction terminating the action in favor of the other party. Accordingly, the propriety of the court's order should be judged by the standards applicable to terminating sanctions. [¶] Sanctions which have the effect of granting judgment to the other party on purely procedural grounds are disfavored. [Citations.] Terminating sanctions have been held to be an abuse of discretion unless the party's violation of the procedural rule was willful [citations] or, if not willful, at least preceded by a history of abuse of pretrial procedures, or a showing less severe sanctions would not produce compliance with the procedural rule. [Citations.]" (4 Cal.App.4th at pp. 97-98, fn. omitted; accord, *Kalivas*, *supra*, at pp. 1161-1162.)

Appellant analogizes her situation to that of the parties in *Security Pacific* and *Kalivas*. She overlooks a significant difference. Although the reasons given for her failure to timely file in the first instance were far from convincing, the trial court provided her one opportunity to cure the defect by continuing the hearing for a month. As a result, appellant had more than three months from the date the motion was filed to prepare and file the opposition. It was only when the second deadline passed that the court exercised its discretion to disregard appellant's submissions. In this regard, the situation is more similar to that in *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, where the trial court "identified the specific deficiencies in the appellants' initial filings, provided their attorney with a summary of the statutes and rules governing proceedings involving motions for summary judgment, and even read him [the applicable local rule] so there would be no confusion as to what it expected when appellants resubmitted their opposition papers." (*Id.* at p. 74.) When appellants instead resubmitted documents that the trial court found "utterly noncompliant with the rules," the Court of Appeal found no abuse of discretion in the trial court's decision to deem undisputed each entry in appellants' separate statement that failed to adhere to the

prior ruling: “The trial court specified deficiencies in appellants’ initial filing, identified the precise manner in which those deficiencies could be rectified, and afforded appellants ample opportunity to prepare new papers in compliance with applicable rules. Precisely this and no more was required” (*Ibid.*; see also *Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 893-894 [no abuse of discretion in granting summary judgment where trial court afforded opposing party one prior opportunity to correct failure to file a separate statement].)

Here, respondent’s filing of its motion for summary judgment on December 17 gave appellant 63 days to prepare and file an opposition. She filed no opposition and failed to request an extension of time to do so until the due date for the opposition had come and gone. In her belated request for a retroactive extension, she sought to blame her lapses on an elective trip abroad and an injury she suffered there. Despite its conclusion that her original default was not excusable, the court afforded appellant an additional 30 days to respond, extending the hearing date into the period needed for trial preparation. Appellant then failed to properly prepare her papers and entrusted them to a messenger to deliver, despite their failure to comply with court rules. As a result, her papers were filed several days late. This time, she attempted to blame the default on her Van Nuys court appearance. By her own admission, however, she had expected to be in hearings in Van Nuys the week her opposition was due, and she offered no compelling excuse for failing to have her papers in order by the second filing deadline.⁹

⁹ Appellant’s suggestion that her pro per status “justif[ies]” her errors “to some extent” is unpersuasive, particularly in light of the fact that while acting in pro per, she repeatedly represented to respondent’s counsel that she was consulting with the attorney who now represents her on appeal.

It is undisputed that appellant did not file -- and the court did not receive -- the opposition on the date due. It is similarly undisputed that consideration of appellant's untimely filed submission would have required the court to continue the trial date, which it had previously indicated it would not do and which respondent's counsel noted would prejudice his client. Under these circumstances, we conclude the court was not required to excuse appellant's second failure to file a timely opposition to the motion for summary judgment. Finding no abuse of discretion, we affirm.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.